NO. 81-5118

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

BENNY DIXON,

Appellant-Petitioner,

-vs-

ROBERT R. RAINES,

Appellee-Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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1. Does petitioner's failure to timely object to grand jury proceedings constitute an independent and adequate state procedural ground barring review of this issue?

2. Since petitioner told the trial court the morning before his trial that he was ready to proceed, did the trial court abuse its discretion by refusing to grant a continuance?

3. Can petitioner show infringement of a federally protected right based on the trial court's ruling admitting evidence of petitioner's prior convictions?

4. Is review of allegedly improper comments by the prosecutor barred by defense counsel's failure to object to any of them?

TABLE OF CASES AND AUTHORITIES

Case	Page
Crisafi v. Oliver 396 F.2d 293 (9th Cir., 1968)	6
State v. Baumann 125 Ariz. 404 610 P.2d 38 (1980)	3
State v. Dixon 125 Ariz. 442 610 P.2d 76 (Ct.App. 1980)	1
State v. Smith 123 Ariz. 243 599 P.2d 199 (1979)	2
State v. Stone 122 Ariz. 304 594 P.2d 558 (Ct.App. 1979)	5
United States v. Fowler 605 F.2d 181 (5th Cir. 1979)	5
United States v. Gates 557 F.2d 1086 (5th Cir. 1977)	5
United States v. Oaxaca 569 F.2d 518 (9th Cir. 1978)	6
United States v. Ortiz 553 F.2d 782 (2d Cir., 1977)	6, 7
United States v. Prewitt 534 F.2d 200 (9th Cir. 1976)	6
United States v. Wiggins 566 F.2d 944 (5th Cir., 1978)	7
Ungar v. Sarafite 376 U.S. 575 84 S.Ct. 841 11 L.Ed.2d 921 (1964)	5
Wainwright v. Sykes 433 U.S. 72 97 S.Ct. 2497 53 L.Ed.2d 594 (1977)	2, 8

AUTHORITIES

Arizona Rules of Criminal Procedure
Rule 6.1(e) 5

Arizona Rules of Evidence
Rule 609(A) 6

STATEMENT OF THE CASE

While working in an undercover narcotics investigation, Officer Jesse Ochoa was approached by petitioner May 23, 1979, in the vicinity of University and Tenth Avenue, an area known as the "tree" in Tucson. Dressed in a black hat, yellow shirt, and brown pants, petitioner asked Officer Ochoa whether he was "looking to cop" (wanted to buy heroin). (R.T. of Nov. 8, 1979, at 18-19; exhibit C.) On that occasion, Ochoa bought two "papers" of heroin from petitioner. Ochoa noted that petitioner had a very distinctive physical characteristic -- parts of fingers missing from his right hand. (Id. at 19-20.) Ochoa's backup, Officer George Smith, was not close enough to observe the face of the individual from whom Ochoa purchased heroin, but Smith did corroborate the clothing that person wore. (Id. at 95.) On June 14, 20, and 22, Ochoa made three more purchases of heroin from petitioner. On those occasions, petitioner identified himself as "Benny." During this period, petitioner was awaiting trial on a charge of possession of narcotics for sale, alleged to have occurred on October 9, 1978. Petitioner was convicted of that charge July 10, 1979, and the conviction was affirmed. State v. Dixon, 125 Ariz. 442, 610 P.2d 76 (Ct.App. 1980). In November 1979, petitioner was convicted of the four sales of heroin originating in May and June of that year. He was sentenced to concurrent terms of 15.75 years on all four counts. The Arizona Court of Appeals affirmed. State v. Dixon, 126 Ariz. 613, 617 P.2d 779 (Ct.App. 1980). The Arizona Supreme Court denied review September 30, 1980. Petitioner's application for a state writ of habeas corpus was denied November 4, 1980.

Petitioner then sought relief in the federal district

court. Finding no merit in any of petitioner's arguments, the district court dismissed the petition January 27, 1981. Similarly, the district court denied a motion for rehearing and a certificate of probable cause, deeming the appeal "frivolous" and the notice of appeal not timely filed. The Ninth Circuit dismissed the appeal as untimely April 14, 1981, and denied reconsideration May 19, 1981.

REASONS FOR DENYING THE WRIT

ARGUMENTS

I

PETITIONER'S FAILURE TO TIMELY RAISE COMPLAINTS ABOUT GRAND JURY PROCEEDINGS CONSTITUTES AN INDEPENDENT AND ADEQUATE STATE PROCEDURAL GROUND THAT BARS REVIEW.

Petitioner alleges that he was convicted upon a charge for which he was not indicted, and that an "unauthorized person" gave hearsay testimony before the grand jury that indicted him. Petitioner failed to raise any claims about grand jury proceedings until he filed a petition for habeas corpus with the Arizona Supreme Court. Under the Arizona Rules of Criminal Procedure, petitioner waived the right to challenge grand jury proceedings by not moving for a new finding of probable cause within the prescribed period. Rule 12.9, Arizona Rules of Criminal Procedure; State v. Smith, 123 Ariz. 243, 599 P.2d 199 (19[illegible]). Thus, even if petitioner had raised these issues on appeal, review would have been precluded for failure to comply with Arizona's procedural rule. State v. Smith, supra. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), forecloses review of this issue. Furthermore, the indictment returned against petitioner alleged sale of narcotics on May 23, June 14, 20, and 22, 1979. Eyewitness

testimony at trial established sales by petitioner on those dates. Petitioner's complaint apparently is directed to the fact that, during grand jury proceedings, the prosecutor asked a witness whether one transaction occurred on June 25. That date should have been June 20. The indictment returned did not charge an offense on June 25; but instead on May 23, June 14, 20, and 22. There was no variance between the written indictment and the testimony at trial. Petitioner was not convicted on a charge for which he was not indicted.

Petitioner raises before this Court an argument he did not present to any Arizona court or the federal district court. He alleges the presence of an "unauthorized person" in the grand jury proceedings, and complains that hearsay was introduced. Aside from the fact that petitioner has waived this argument also by failing to raise it timely, the argument has no merit. The law of Arizona provides that a grand jury indictment may be returned on the basis of hearsay. State v. Baumann, 125 Ariz. 404, 610 P.2d 38 (1980). Moreover, Agent Armando Saenz, who testified before the grand jury that indicted petitioner, did not say that he personally witnessed any drug transaction; he stated that Agent Ochoa, who later testified at trial, participated in the four transactions with petitioner. Agent Ochoa testified at trial from his personal knowledge and participation in all four sales of heroin from petitioner to Ochoa. Thus, petitioner's argument has no merit, and is procedurally barred for failure to raise it timely. Wainwright v. Sykes, supra.

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER A CONTINUANCE WHEN PETITIONER PROCEEDED PRO SE UNTIL THE MORNING OF TRIAL.

Petitioner alleges deprivation of constitutional rights due to the trial court's denial of his motion to continue made on the morning of trial. Dissatisfied with his first appointed attorney, petitioner filed three pro se motions, among them a request to proceed pro se. These motions, which include citations of authority, indicate familiarity with the criminal justice system. At a hearing on October 15, Judge Norman S. Fenton questioned petitioner about his desire to represent himself. Petitioner stated that he was no novice to criminal proceedings and that he felt competent to represent himself. (R.T. of Oct. 15, 1979, at 5-6; exhibit A.) Michael Pollard was appointed as advisory counsel and trial was set for November 7. The day before trial, petitioner indicated that he was ready to proceed. (R.T. of Nov. 7, 1979, at 11; exhibit B.)

The morning of trial, petitioner, accompanied by advisory counsel, presented a habeas corpus petition and attempted to reargue a previously denied motion to dismiss the indictment. Having lost these motions, petitioner moved to continue in order to secure the transcript of a hearing at which Officer Ochoa testified. The trial court denied the motion, but ordered a transcript of the hearing prepared within 24 hours. (R.T. of Nov. 7, 1979, at 26; exhibit B.) Petitioner gave no other reason for seeking a continuance. The prosecutor then requested that the trial court apprise petitioner of the fact that he had no constitutional right to hybrid representation. (Id.)

State v. Stone, 122 Ariz. 304, 594 P.2d 558 (Ct.App. 1979). Immediately after learning that he could not represent himself and have counsel speak for him also, petitioner withdrew his waiver of counsel and asked for appointed counsel. (R.T. of Nov. 7, 1979, at 16; exhibit B.) The trial court appointed Mr. Pollard, who had been advisory counsel for 3 weeks, as trial counsel.

The Arizona Court of Appeals held that the trial court properly denied the continuance, regardless of any reference to Rule 6.1(e), Arizona Rules of Criminal Procedure. 617 P.2d at 782. There is no constitutional right to a continuance. This Court has held that whether or not denial of a continuance amounts to a violation of due process depends upon the totality of circumstances and the reasons presented to the trial judge at the time the request is made. Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964). "The right to assistance of counsel, cherished and fundamental though it may be, may not be put to service as a means of delaying or trifling with the court." United States v. Fowler, 605 F.2d 181, 183 (5th Cir. 1979). See also United States v. Gates, 557 F.2d 1086 (5th Cir. 1977).

When he requested a continuance, petitioner's sole reason was to procure a transcript. That transcript was provided within 24 hours. Moreover, petitioner's only defense was mistaken identity. Considering four face-to-face sales to Officer Ochoa and the fact that petitioner has parts of fingers missing from his right hand, the Arizona Court of Appeals concluded that his defense was totally destroyed and that a continuance would not have diminished the overwhelming evidence against petitioner. 126 Ariz. at 616, 617 P.2d at 782. Respondent submits that

petitioner had no valid basis for a continuance and has not demonstrated any prejudice resulting from denial of that motion. The district court found no merit in this argument.

III

RULINGS ON ADMISSIBILITY OF EVIDENCE ARE MATTERS FOR THE STATE COURT AND PETITIONER CAN SHOW NO VIOLATION OF A FEDERAL CONSTITUTIONAL RIGHT.

At trial, the state sought to impeach petitioner's credibility by introducing previous convictions for burglary, theft, and possession of heroin for sale. Since petitioner denied that he had ever seen the undercover officer to whom he made four heroin sales, petitioner's credibility was of paramount importance. The trial court specifically ruled that, under Rule 609(A), Arizona Rules of Evidence, the probative value of the prior convictions outweighed the possible prejudice. (R.T. of Nov. 8, 1979, at 138-39); exhibit C.)

Admissibility of evidence is a matter of state law, and presents no constitutional question unless there is an error of such magnitude that it denies petitioner fundamental due process. Crisafi v. Oliver, 396 F.2d 293 (9th Cir.), cert. denied, 393 U.S. 889 (1968). Under Rule 609(A) -- both state and federal versions -- the trial court has wide discretion in determining whether to exclude evidence of prior convictions. United States v. Oaxaca, 569 F.2d 518 (9th Cir. 1978); United States v. Prewitt, 534 F.2d 200 (9th Cir. 1976). The findings of the trial court should not be disturbed in the absence of a clear showing of abuse. United States v. Ortiz, 553 F.2d 782 (2d Cir.), cert. denied, 434 U.S. 897 (1977). Prior convictions are not inadmissible simply because they are similar to the

offense for which the defendant is on trial. United States v. Wiggins, 566 F.2d 944 (5th Cir.), cert. denied, 436 U.S. 950 (1978); United States v. Ortiz, surpa. Since petitioner placed his credibility at issue by taking the stand and testifying that he had never seen Officer Ochoa, respondent submits that the prior convictions were properly admitted for impeachment. The district court found impeachment was properly permitted.

Contrary to petitioner's assertion, his counsel did not request any instruction about the limiting use to be made of prior felony convictions with regard to petitioner's credibility. In fact, it was the prosecutor, not defense counsel, who requested that the trial court give an instruction about the limited consideration the jury should give to the fact that petitioner had been previously convicted of other felonies. (R.T. of Nov. 9, 1979, at 55; exhibit D.) Defense counsel's instruction number 3 was designed to instruct the jury that petitioner was a competent witness on his own behalf. During voir dire, the trial court asked potential jurors if they would give the defendant the same credence as any other witness and judge him under the same rules of evidence as all other witnesses. (R.T. of Nov. 7, 1979, 69-70, 84; exhibit B.) Before the jury retired to deliberate, the judge gave an instruction about the jury's duty to evaluate the credibility of each witness according to the same criteria. (R.T. of Nov. 9, 1979, at 49-52; exhibit D.) The district court found that petitioner's complaints about jury instructions were meritless.

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IV

PETITIONER WAIVED ANY OBJECTION TO PROSECUTORIAL COMMENTS BY FAILING TO OBJECT TIMELY.

Petitioner asserts that the prosecutor made improper comments during closing arguments. Defense counsel did not object to the state's comments in closing argument, and the Arizona Court of Appeals ruled that petitioner waived any objection. 126 Ariz. at 617, 617 P.2d 1340 (1977). Defense counsel's failure to comply with Arizona's contemporaneous objection rule constitutes an independent and adequate state procedural ground that precludes review of this matter. Wainwright v. Sykes, supra. The district court found that petitioner had shown neither cause for failing to object timely, nor prejudice, and held that it was precluded from reviewing the matter.[1]

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1. Because petitioner's fifth "argument" is merely a complaint about filing dates, respondent will not respond.

CONCLUSION

There is no compelling reason to grant certiorari. Every court that has considered petitioner's arguments -- including the federal district court -- has found them to be without merit. Respondent submits that petitioner has neither alleged nor demonstrated any error of constitutional magnitude, and respectfully requests that the Court deny certiorari.

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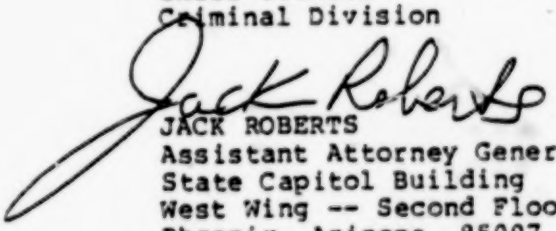

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